

Modesti Brothers, Inc. and Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-7571

April 13, 1981

DECISION AND ORDER

On October 22, 1980, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.¹

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge, to modify his remedy,⁴ and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Modesti Brothers, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ Respondent attaches to its exceptions copies of telegrams, dated subsequent to the unfair labor practice hearing, purporting to offer alleged discriminatees Brudie and Rakaska positions with Respondent. Respondent asserts that Brudie and Rakaska declined these positions. On January 8, 1981, Respondent filed a letter with the Board asserting that the positions offered Brudie and Rakaska had been filled. On January 21, 1981, counsel for the General Counsel filed a letter in response to Respondent's exceptions and letter. On January 23, 1981, Respondent filed a letter in reply to the January 21 letter. Inasmuch as Respondent's assertions regarding offers of reinstatement are matters which are properly left to be considered at the compliance stage of this proceeding, we make no findings regarding these matters at this time. Similarly, we shall leave to compliance for resolution Respondent's claim that backpay for Brudie and Rakaska should be tolled because no jobs would have been available for them after their layoff owing to the economic circumstances allegedly facing Respondent at that time.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ We find no merit to Respondent's exceptions regarding the Administrative Law Judge's alternative basis for finding the 8(a)(3) violations since the matter was fully litigated.

⁴ The Administrative Law Judge inadvertently failed to include *Florida Steel Corporation*, 231 NLRB 651 (1977), as the formula for interest payments.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten our employees with discontinuing our business operations if the employees choose to be represented by Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT threaten our employees with increased productivity if the employees choose to be represented by Teamsters Local 807, or any other labor organization.

WE WILL NOT solicit grievances and demands from our employees in order to induce them to refrain from supporting Teamsters Local 807, or any other labor organization.

WE WILL NOT coercively interrogate employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten that any of our employees will be laid off if Teamsters Local 807, or any other labor organization, becomes the collective-bargaining representative of the employees.

WE WILL NOT threaten to discontinue our policy of lending money to employees if they choose to be represented by Teamsters Local 807, or any other labor organization.

WE WILL NOT terminate or take any other adverse action against any employees because they support Teamsters Local 807, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer Kevin Brudie and Roy Rakaska full and immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges previously enjoyed, and

WE WILL make them whole, with interest, for any loss of earnings they may have suffered by reason of our termination of their employment.

All our employees are free to become and remain, or to refrain from becoming and remaining, members of Teamsters Local 807, except to the extent that such right may be affected by an agreement authorized by the proviso in Section 8(a)(3) of the Act.

MODESTI BROTHERS, INC.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard before me in Brooklyn, New York, on June 16, 17, and 18 and July 9, 1980. The complaint was issued on December 31, 1979, based on a charge filed on November 1, 1979, by Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union. The basic issues raised by the complaint, which alleges that Modesti Brothers, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, are whether Respondent: (1) interrogated its employees concerning their membership in, activities on behalf of, and sympathy for the Union; (2) threatened its employees with discharge and other reprisals for supporting the Union; (3) offered and promised its employees benefits and improvements in their working conditions to induce them to refrain from supporting the Union; (4) solicited grievances from its employees for the purpose of inducing the employees to refrain from supporting the Union; and (5) discharged employees Roy Rakaska and Kevin Brudie due to their activities on behalf of the Union.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation located at 34-33 36th Street, Long Island City, New York, where it is engaged in performing general freight trucking service. During the calendar year 1979, Respondent derived gross revenue in excess of \$50,000 for the transportation of freight from States outside the State of New York directly to points inside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Kevin Brudie was employed by Respondent as a driver in June 1978;¹ Roy Rakaska began his employ with Respondent, also as a driver, on March 19, 1979. Brudie, Rakaska, and one other driver were the only drivers of Respondent who did not have a regular assigned route; they drove wherever necessary. According to Rakaska's testimony when he was hired Modesti Jr.² told him that Respondent never laid anyone off no matter how busy or slow business was. Modesti denied this, and Brudie testified that Modesti did not tell him anything about layoffs when he was hired. During the employment periods of Brudie and Rakaska, Respondent employed nine other drivers³ and, since the employment periods of Brudie and Rakaska, Respondent has hired no new drivers. During the period of their employment, both Brudie and Rakaska worked, at least, 40-hour, 5-day weeks, every week, with the exception of Brudie, who took a 2-week vacation in 1979 and was away from work for 9 days after he had an accident with his truck in October 1978.

In or about the beginning of September 1979,⁴ Brudie and Rakaska began discussing the possibility of bringing a union into Respondent's shop. On or about September 5 or September 7 they went to the Union and spoke to an organizer, Bill O'Keefe, who gave them authorization cards and told them to speak to the other employees about the Union and ask them to sign the authorization cards. Brudie and Rakaska each distributed three or four cards to the other drivers (excluding the Modestis); Brudie gave the cards to the other drivers on the loading platform after working hours; Rakaska handed them out off Respondent's premises, after working hours, and outside the presence of Modesti Sr., Modesti Jr., and Walter Modesti. They collected, in all, six or seven signed authorization cards. Brudie and Rakaska then returned the signed authorization cards to O'Keefe, and, at his request, set up a meeting with the employees who had signed the cards, and O'Keefe, at a luncheonette near Respondent's premises. At the meeting O'Keefe informed

¹ Edward Modesti, Jr., testified that about 1 month earlier one of Respondent's drivers had left its employ. "He had left and we had a void," he testified. Modesti Jr. later testified that this employee was laid off a month before Brudie was hired.

² Respondent's answer denied the allegation in the complaint that Modesti Jr. is a supervisor and agent of Respondent. His father, Edward Modesti Sr., is president of Respondent. Although Modesti Jr. testified that he performs numerous duties at Respondent, such as loading, unloading, and driving the trucks, and acting as a salesman, Respondent, at the hearing, admitted for the purposes of this proceeding that Modesti Jr. is a supervisor and agent of Respondent.

³ The nine drivers include Modesti Jr. and Walter Modesti, brother of Modesti Sr. Modesti Jr. testified that Walter Modesti drives a truck. Brudie testified that during his 15 months of employment with Respondent he only observed Walter Modesti driving "every so often when all the drivers went out and something came in he would go out." Respondent introduced bills of lading, randomly taken from its files, establishing that from February 2 to September 5, 1979, Walter Modesti made at least 47 truck pickups.

⁴ Unless otherwise stated, all dates referred to herein are in 1979. Also, unless otherwise stated, Modesti refers to Edward Modesti, Jr.

the employees of the benefits the Union could provide them.

On September 13 the Union sent the following letter to Respondent:

Gentlemen:

The majority of your truck drivers and helpers have designated Truck Drivers Local Union No. 807 IBT as their sole collective-bargaining representative in all matters pertaining to wages, hours, and all other terms and conditions of employment. Accordingly we request that you recognize Local 807 as the exclusive bargaining representative of such employees.

We further request that you or your authorized representative meet with us promptly to negotiate a collective bargaining agreement to cover said employees.

Please call the undersigned immediately to arrange a mutually convenient date, time and place of meeting to conduct such collective bargaining.

B. The September 14 Speech

Respondent received the above-quoted letter on the following day, September 14, and at or about 5 p.m. called all the drivers to a meeting in the back of Respondent's loading platform. As often occurs in these situations there is disagreement among the witnesses as to what Modesti (who did all the talking for Respondent) said.

According to Brudie, Modesti stated that he had received a letter from the Union and he wanted to know the identity of the person who started it. He told the employees to discuss their grievances and demands among themselves and think about it over the weekend and to "give me a list on the following Monday what your demands and grievances are." He told the employees that if the Union came in productivity would have to increase because of the higher salaries and benefits. He also stated that Respondent was a small company and that it could not handle the Union coming in and "if they had to shut the doors of the place, they would." He then informed the employees that his father and uncle were getting older, that he had a lot of experience in the business, and that there would be no problem for him to get a job elsewhere, so it would not matter about closing the doors.

According to Rakaska, Modesti started the meeting by stating that he had a letter from the Union stating that the employees wanted a union and he could not understand it, since for 40 years there was no union. He said that he had heard that there was a meeting with the Union at the luncheonette the night before and further said, "I want to know who the person was that went down to the Union hall and got this thing started." He told the employees that Respondent was a small company that was not making much money and said, "I will close the doors if the Union comes in here; my uncle and father can retire and I can find a job elsewhere." Modesti then told the employee to think about it over the weekend and on Monday to come up with a list of demands that they want in order to forget about the Union.

According to Modesti, he was upset upon receiving the letter and he informed the employees that his father and uncle had asked him to speak to the employees because they were very upset and they felt he could convey their thought to the drivers better than they could do themselves. He told the employees, "We received a letter from the Union. We're not going to hold this against anyone; we're not going to be prejudiced against anyone; we're not going to fire anyone; we're not going to be prejudiced against anyone; we would like to know what this is all about." Modesti waited for a response from the employees, and when none materialized he asked if anyone knew anything about it. He went on to say, "We really can't understand how come you fellows did this to us. There's over a hundred years of service here. You fellows have been in business with us for many many years. We've been in business over a hundred years. The least you fellows could have done is come to us if you had a problem." Modesti testified that he could neither admit nor deny that he asked the employees to submit to him a list of the grievances or demands by the following Monday. As to the testimony of Brudie and Rakaska that he told the employees at this meeting that if the Union came in the productivity of the employees would have to increase and Respondent would have to close its doors, Modesti testified, "I don't really specifically remember it. If I did say it, I may have said it in the contents [sic] of if demands are excessive we may have to increase productivity, but as far as anything beyond that I don't recall saying anything other than that."⁵ With respect to the possibility of closing the plant, Modesti's testimony was, "I went over it briefly and I said if the demands are excessive we may have to close. That's the closest I can go. I mean, whether I said exactly like that or a little differently, that's the closest I can remember." He testified, however, that he never specifically said that if the Union came in Respondent definitely would close, or if the Union came in productivity would have to increase.

C. The September 17 Meeting of Modesti and Brudie

Brudie testified that on the morning of September 17 Modesti told him to come into his office, which he did. Nobody else was present. Modesti asked Brudie if he was present at the union meeting at the luncheonette the prior week and if he had anything to do with the Union; Brudie answered "no" to both questions. Modesti said that he would have been shocked if it had been Brudie because he did not think Brudie planned on making a career working for Respondent since he knew he was attending night school. Modesti also told Brudie that if the Union came in he would be laid off since he was low in seniority and Respondent would not be able to pay the increased salaries.

When Modesti was asked whether "there was such a meeting and what you said if there was such a meeting," he testified, "[T]o be perfectly honest I can't say yes and I can't say no on it. I don't recall."

⁵ Modesti testified that the Union's letter of September 13 contained no sample union contract nor list of bargaining demands, and that he has had no prior dealings with the Union.

D. The September 17 Meeting With All Employees⁶

According to Brudie, Modesti (who, again, did all the talking for Respondent) had a stack of repair bills in front of him and told the drivers how much he had spent to repair each of the drivers' trucks. He said, "I cannot afford to have a union, I have very big expenses." Brudie then said, "[T]his is a business; you have bills to meet, so do the men that work for you." Modesti then asked the employees for their list of grievances and demands. He stated that if the Union came in their productivity would have to increase drastically, and if Respondent had to close its doors it would; he said that he could find a job almost anywhere, and his father and uncle could retire. Modesti then said that Respondent was a small company and any time one of the drivers needed money Respondent would lend him the money he needed, but that would be eliminated if the Union came in.

Rakaska testified very briefly about this meeting. According to him, Modesti talked about the expenses of the trucks and asked for the employees lists of demands; Brudie informed Modesti that the employees did not have the demands ready. Rakaska did not recall anything further having been said at this meeting.

Modesti testified that at this meeting he took out the bills for the trucks and showed them to the drivers and told them that Respondent has expenses that the drivers do not see. He also testified that he did not say that Respondent's doors would close if the Union came in, or that productivity would increase if the Union came in, although he may have said that if the Union's demands were excessive Respondent may have to close or productivity may have to increase. With regard to the allegation that he threatened to stop lending money to the drivers if the Union became their collective-bargaining representative, Modesti testified that he did not recall saying anything about that at the meeting, although Respondent has had a practice of lending money to its employees when they request it.

E. The September 24 Meeting With All Employees

According to Brudie's testimony (Rakaska, as will be discussed below, was laid off on September 18), this meeting also took place at or about 5 p.m. He testified that Modesti asked for the employees' list of demands and grievances and he (Brudie) stated that "they didn't have a list, that it was in the Union's hands." Modesti asked what he meant, and he said that the Union was taking care of the case, and that the drivers were annoyed that Respondent was not paying them for all the hours they

were working. Modesti then stated that if the Union was certified the drivers would have to increase their productivity.

Modesti testified that he did not recall this meeting; he only recalled three meetings with the employees: The two above-mentioned meetings and a meeting held shortly before the election which was held on November 5.⁷

F. The Layoffs of Rakaska and Brudie

On September 18 at or about 4:50 p.m., at the end of his workday, Rakaska was informed by Modesti that he was being laid off; he was not informed of any reason for the layoff. On September 25, at or about 5 p.m., at the end of his workday, Brudie was informed by Modesti Sr. that "things are slow, I have to lay you off." Brudie asked him for a pink slip for the unemployment office, but Modesti told him that he would not need it.⁸

Respondent denies any knowledge of any union activity by Brudie and Rakaska, and defends its action in laying them off on the fact that its business had slowed down. They were the least senior drivers and were hired at a time when business considerations necessitated their hire; however, in September 1979 business had decreased considerably, necessitating the layoff of two drivers, and, since Brudie and Rakaska were the least senior, they were chosen.⁹

Numerous exhibits, as well as oral testimony, were received into evidence to establish the amount of business Respondent was doing in September 1979. Compared to earlier periods this evidence is set forth below.

Respondent's income tax return for 1978 (Respondent's fiscal year is the calendar year) showed a taxable income of \$12,116 on gross receipts of \$349,000; its tax return for 1979 showed taxable income of \$8,625 on gross receipts of \$414,000. These returns establish that in 1978 Respondent's travel and entertainment expense was \$3,204, insurance expense was \$29,074, employee pension plan contributions were \$7,866, and its compensation of officers was \$52,204. In 1979 these figures were travel and entertainment \$9,646, insurance \$47,818, employee pension plan contributions \$12,432, and officers salaries \$48,959.

Respondent's monthly sales (or revenues) for 1978 and 1979 were as follows:

⁷ At the election five votes were cast for the Union, three votes were cast against the Union, and there were two challenged ballots—the Union's challenge to the ballot of Modesti Jr. and Respondent's challenge to the ballot of Rakaska. On July 2, 1980, the Board issued a Decision and Certification of Representative certifying the Union as the collective-bargaining agent of Respondent's employees.

⁸ September 18 and 25 were on Tuesdays in 1979. Respondent's payroll period workweek is Monday through Friday with payday on Thursday.

⁹ On May 15, 1980, Respondent sent Brudie a telegram to return to work on May 19, 1980, stating that "[a] temporary need has arisen for another truck driver if you are interested." He was employed there for about a month before being laid off again. Respondent claims that Brudie was needed because one employee had left its employ after having a heart attack and had not returned, another employee was away for 2 months with a broken thumb, returning to work in mid-June 1980, and a third employee left its employ, also with a broken thumb, on May 2, 1980.

⁶ There is some disagreement as to whether this meeting occurred on September 17 or 18 or even later. Brudie and Rakaska testified that the meeting took place, after work, at or about 5 p.m. As Rakaska testified that he attended this meeting and was discharged at or about 4:50 p.m. on September 18, it is reasonable to assume that this meeting took place on September 17. Further complicating this issue, however, is Brudie's testimony that present at this meeting "was myself and all the other drivers minus Roy." However, as both Brudie and Rakaska testified that at this meeting Modesti discussed expenses on the trucks and the list of grievances and demands he had earlier asked the employees for on September 14, I would find that Brudie was mistaken, that Rakaska was present at this meeting, and that (as stated above) it took place on September 17.

Month	1978	1979
January	\$22,689	\$34,845
February	21,406	28,528
March	29,129	38,019
April	27,389	30,725
May	31,629	38,812
June	33,773	36,364
July	27,857	35,038
August	30,751	37,858
September	33,122	33,868
October	31,849	42,116
November	30,817	33,875
December	28,396	23,951

In making the necessary comparison of these figures, and others set forth below, consideration must be given to the tariff increases and fuel surcharge increases instituted by Respondent in 1979; without these factors a comparison of the 1978 and 1979 figures would not be as appropriate as it otherwise would be, as my purpose is to look at a comparison of the sales figures not for the figures themselves, but to examine and compare them in determining how many drivers were needed by Respondent during the critical period.

Effective April 12, 1979, Respondent (as well as other trucking companies) was authorized to, but was not bound to, increase its tariffs by 5.5 percent, and it did so; the same was true for an increase of 1.4 percent, effective June 11, 1979, which Respondent effectuated, and an additional increase of 3.4 percent effective July 13, 1979, which canceled out the previous 1.4 percent, which Respondent also effectuated. Additionally, Respondent was authorized to institute a 2.8-percent increase, effective October 1, 1979, which it also effectuated. In addition to these tariff increases, due to the rising fuel costs, Respondent (as well as other trucking companies) was granted a fuel surcharge. This was in an amount of 4 to 5 percent, was effective sometime in June 1979, and authorized Respondent to increase its tariffs by this amount, which it did. Based upon these increases, the "adjusted"¹⁰ monthly sales figures were as follows:

Month	1978	1979
January	\$22,689	\$34,845
February	21,406	28,528
March	29,129	38,019
April	27,389	29,735
May	31,629	36,678
June	33,773	33,182
July	27,857	30,300
August	30,751	32,786
September	33,122	29,330
October	31,849	36,473
November	30,817	29,336
December	28,396	20,742

Respondent also prepared a summary of the number of pickups and deliveries made by its drivers, monthly, and a summary of the total monthly weights of the pickups

¹⁰ Assuming a 4.5-percent fuel surcharge and that sales were level throughout the month.

and deliveries made by its drivers in 1979 as follows:

Deliveries and Pickups

January	1,088
February	1,016
March	1,403
April	1,149
May	1,303
June	1,255
July	1,085
August	1,234
September	1,063
October	1,308
November	1,126
December	872

Weights (Pounds)

January	1,074,200
February	1,333,991
March	1,215,208
April	1,089,140
May	1,254,467
June	1,134,292
July	1,302,243
August	1,051,786
September	1,021,453
October	1,226,882
November	944,876
December	754,837

In addition, Respondent prepared a document (Resp. Exh. 4) setting forth the amount of business it transacted with five specific customers. These charts show a drastic decrease in the amount of business transacted with these companies after the middle of 1979. Modesti testified that in early 1979 Respondent expected a substantial increase in business from several new customers, especially some of the customers set forth in Respondent's Exhibit 4, but that the amount of business Respondent did with these customers did not increase as expected, and, in fact, decreased substantially or stopped entirely. Modesti testified that a large portion of the pickups and deliveries to these customers were handled by Brudie and Rakaska; Brudie testified that these companies represented only a small part of his work. Modesti also testified that, although Respondent increased its travel and entertainment expenses in 1979 as compared to 1978 in order to attract new customers, it has not been able to acquire any new business accounts since September 1979.

Also relevant to Respondent's financial condition at the time of the layoffs is the number of trucks it owned. In mid-1979, prior to the layoffs, it owned 11 trucks; of this number, 2, a 1974 20-foot International and a 1979 20-foot International, were purchased in 1978. In addition, Respondent spent \$7,544 repairing and enlarging the truck that Brudie drove. Modesti testified that Respondent was increasing its fleet for the anticipated increase in business. In December 1979, however, Respondent sold two 1968 12-foot vans and since that time has been attempting to sell a 1969 16-foot truck.

Since the layoffs of Brudie and Rakaska, their work has been performed by the other drivers without the

need of any of them working overtime; in addition, Respondent has not subcontracted any more of its driving work than it had prior to the layoffs. The only exception to this is that on approximately four occasions in 1980 Respondent used Frank King to drive a truck when no other employee was available. King, who retired in or about 1970, has been employed by Respondent since that time loading trucks for about 1 hour a day. Brudie, both before his layoff and during the brief period he returned to Respondent's employ in 1980, drove trucks for Respondent that were carrying over the legal weight of cargo.

IV. CREDIBILITY DETERMINATIONS

As there is substantial disagreement between Brudie and Rakaska on one side and Modesti on the other as to what was said at the meetings of September 14 and 17, it is necessary to decide on the credibility of these witnesses. Brudie impressed me as a frank and honest witness. Although he sometimes lapsed into giving conclusory answers, he exhibited an ability to recall events long past in a straightforward and orderly manner. I also believe that generally Rakaska sought to the best of his ability to tell the truth, although his memory of these meetings was not as complete as was Brudie's. The one exception to this is that I do not credit Rakaska's testimony that when he was hired Modesti told him Respondent does not lay anyone off no matter how busy or slow business is; it seems improbable to me that an employer in a competitive industry such as the trucking industry would inform a job applicant, who came in off the street on the basis of a newspaper advertisement, that the company does not layoff people no matter how bad business is. The fact that Brudie testified that he was not told this when he was hired reinforces this impression. I would not credit Modesti's testimony regarding the meetings of September 14 and 17. His testimony was too vague to be believable. For example, his testimony regarding his statements of a possible increase in productivity and possible closing of the shop, allegedly made at the September 14 and 17 meetings, was extremely uncertain; it would seem that, given the great importance of this matter to Respondent, and the subject of Modesti's speech, he would better remember its contents. An additional reason for not crediting Modesti is that he testified that at the September 14 meeting he informed the employees that "we're not going to fire anyone" (not testified to by either Brudie or Rakaska) and yet 2 business days later Respondent laid off Rakaska, and a week later it laid off Brudie. It seems to me that Modesti's statement and his actions are contradictory.

V. ANALYSIS AND CONCLUSIONS

A. The September 14 Meeting¹¹

In *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court stated at 618-619:

¹¹ Respondent, in the "Second Defense" in its answer, states: "The NLRB does not have jurisdiction over the [a]cts alleged in paragraphs of the [c]omplaint numbered '8,' '9,' '10' and '11' because no unfair labor practice charge has been filed in connection therewith." The court, in *N.L.R.B. v. Pecheur Lozenge Co., Inc.*, 209 F.2d 393 (2d Cir. 1953), stated

An Employer . . . may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control" and not "threats of economic reprisal to be taken solely on his own volition." *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198, 202 [2d Cir. 1967].

Modesti's statements at this meeting that if the Union came in productivity would have to increase because of higher salaries and benefits, that because Respondent was a small company it could not handle the Union's coming in, and that if Respondent had to shut the doors of the place it would do not meet the tests of *Gissel, supra*, and therefore violate Section 8(a)(1) of the Act. The statements were not accompanied by any factual explanation of the necessity of the actions;¹² in fact, there could be none at that time since the Union had made no bargaining demands upon Respondent. The mere fact that Modesti phrased his threats in terms of "higher salaries and benefits" and that Respondent was a small company is not enough; in order to be lawful, Modesti's statement had to "be carefully phrased on the basis of objective fact to convey [his] belief as to demonstrably probable consequences beyond his control." *Gissel, supra*. Not only were his statements not phrased on the basis of objective fact, but the consequences he referred to (increased productivity and closing) were clearly set forth to the employees as within his exclusive control; this point was stressed by his statement that his father and uncle could retire and he could easily find another job, so it would not matter about closing.

I would also find that Modesti's request to the employees, at this and later meetings, to give him a list of their grievances and demands violates Section 8(a)(1) of the

at 401: "This Court and other courts have rejected attempts, such as the Company makes here, to restrict the Board's complaint to the precise violations specified in the charge." The court then, citing *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952), stated that a "complaint . . . may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge." Both of these requirements are satisfied herein.

¹² *Spalding, Division of Questor Corporation*, 225 NLRB 946 (1976); *World Wide Press, Inc.*, 242 NLRB 346 (1979).

Act. I would find this violation whether the request was accompanied by the reason for the request—in order to forget about the Union—as testified to by Rakaska), or whether it was not (as testified to by Brudie), as the other statements made by Modesti at this meeting and the other meetings could have left no doubt in the employees' minds as to the reason for his request.

In *Uaro, Incorporated*, 216 NLRB 1 (1974), the Board stated:

[T]he solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

In *Uarco, supra*, the Board found no violation because the employer rebutted the inference by repeatedly informing the employees that it could make no promises regarding the grievances raised.¹³ Additionally, the Board found the record devoid of any showing of union animus or concurrent unfair labor practices on the part of the employer.

In *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478 (1977), the employer, a few days after the union began its organization drive, informed his employees that he "wanted to find out what kind of problems they were having" and that he would "talk to them concerning such problems." The Board, quoting the above-mentioned language from *Uarco, supra*, found a violation of Section 8(a)(1), stating: "In the instant case, there is no evidence that Respondent made any statement or took any action to establish that it was not promising to remedy grievances and we therefore find that Respondent did not meet its burden or rebutting the inference."

In the instant matter, Modesti began the meeting by informing the employees of the Union's request for recognition that day. When he then asked the employees for their list of grievances and demands and followed this request with numerous 8(a)(1) violations, his purpose became obvious. In addition, he never made a "no promises" statement to the employees and his request therefore violated Section 8(a)(1) of the Act.

¹³ See also *Tiffin Division of Hayes-Albion Corporation*, 237 NLRB 20 (1978), where the Board found no violation in the employer's soliciting grievances and questions at meetings with employees, since the employer took a "no promises" position at these meetings.

I would also find that Modesti's statement, "I want to know who the person was that went down to the Union hall and got this thing started," was coercive interrogation in violation of Section 8(a)(1) of the Act.¹⁴

B. The September 17 Meeting of Modesti and Brudie

I find that Modesti's questioning of Brudie as to whether he was present at the Union's meeting at the luncheonette and whether he had anything to do with the Union constituted interrogation in violation of Section 8(a)(1) of the Act. It occurred only 1 working day after the Union's request for recognition and Respondent's numerous 8(a)(1) violations of the same day. Additionally, the questioning was not accompanied by an explanation of its purpose, nor by any assurance against reprisals.¹⁵

I would likewise find that Modesti's statement to Brudie that if the Union came in he would be laid off since he was low in seniority and Respondent would not be able to pay the increased salaries constitutes a threat in violation of Section 8(a)(1) of the Act.¹⁶

C. The September 17 Meeting With All Employees

With one exception, I find it unnecessary to make any findings with respect to the statements made at this meeting, as they would be simply cumulative to findings already made. The exception is that I would find that Modesti's statement at this meeting that if the Union came in Respondent would eliminate its loans to the drivers violates Section 8(a)(1) of the Act. This was not something "beyond his control," but was rather a "threat of economic reprisal to be taken solely on his own volition." *Gissel, supra*.

D. The September 24 Meeting With All Employees

I find it unnecessary to make any findings regarding the statements made at this meeting as all allegations or violations would be cumulative to findings already made.

E. The Layoffs of Rakaska and Brudie

This is, of course, the most significant and difficult part of this matter. The General Counsel maintains that the timing of the layoffs, together with the threats, interrogation, and solicitation of grievances, establishes that Brudie and Rakaska were terminated due to their attempt to establish the Union as their collective-bargaining representative. Respondent alleges that it had no knowledge that Brudie and Rakaska were engaged in any activity on behalf of the Union, and that the layoffs were due to a slowdown in its business.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board set forth the rule it will henceforth apply in dual-motive or pretextual cases such

¹⁴ *Hanover Concrete, Co.*, 241 NLRB 936 (1979); *Dependable Lists, Inc.*, 239 NLRB 1304 (1979).

¹⁵ *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967); *Solboro Knitting Mills, Inc.*, 227 NLRB 738 (1977), enfd. as modified 572 F.2d 936 (2d Cir. 1978); *Bonnie Bourne, an individual, d/b/a Bourne Co. v. N.L.R.B.*, 332 F.2d 47 (2d Cir. 1964).

¹⁶ *C. Markus Hardware, Inc.*, 243 NLRB 903 (1979); *Willow Corporation d/b/a Town & Country Supermarkets*, 244 NLRB 303 (1979).

as the instant matter: "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." The General Counsel has made a *prima facie* showing herein sufficient to support the inference that the protected conduct by Brudie and Rakaska was a motivating factor in Respondent's termination of their employment.

The most important factor in this determination is the timing of the layoffs¹⁷—Rakaska was laid off only 2 workdays after the Union's request for recognition and Brudie was terminated a week later. At the time, Rakaska had been regularly employed by Respondent for 6 months, and Brudie for 15 months, during which time they had always worked 40-hour weeks and had not been previously laid off; nor had any other employee. The immediacy of these layoffs, the fact that they both occurred in the middle of a workweek, the fact that neither Brudie nor Rakaska was given any warning of any impending layoff (and that Brudie had taken his vacation the week before), and the fact that, just prior to these layoffs, Respondent, upon receiving the Union's request for recognition, immediately began engaging in numerous 8(a)(1) violations¹⁸ creates a strong inference that Respondent terminated their employment in order to stop the Union's progress in its tracks.¹⁹

I have found that the General Counsel has sustained his initial burden even though there is no evidence of Respondent's actual knowledge of Brudie's and Rakaska's activities on behalf of the Union. There are a number of reasons supporting this. Firstly, at the September 14 meeting Modesti informed the employees that he had heard there was a meeting with the Union at a luncheonette the previous evening; it is not unreasonable to assume that if one of the drivers informed him of the meeting he also informed him that Brudie and Rakaska arranged the meeting. Secondly, I believe that knowledge of their activities can be imputed to Respondent under the "small-plant doctrine."²⁰ Excluding Brudie, Rakaska, and the Modesti's there were only seven drivers employed by Respondent, certainly enough to consider Respondent's operation under this doctrine. Although Brudie and Rakaska solicited cards from the other employees outside the presence of Modesti Sr., Modesti Jr., and Walter Modesti, that alone does not discount the applicability of this doctrine. As the Board stated in *A to Z Portion Meats, Inc.*, 238 NLRB 643 (1978): "[T]he fact that an employee has taken pains to conceal his organizing activity from management may

reduce, but does not necessarily eliminate, the weight to be accorded the smallness of the plant." With such a small unit, with the commission of numerous 8(a)(1) violations almost immediately upon receiving the Union's request for recognition, with Modesti's statement that he knew of the employees' meeting with the Union the night before, and with the timing of the terminations, I believe it is a reasonable inference that Respondent knew that Brudie and Rakaska were the solicitors for the Union. Additionally, Brudie's statement to Modesti at the September 24 meeting, that the matter was in the Union's hands and that the Union was taking care of the situation because the drivers were annoyed that Respondent was not paying them for all the hours they worked, may well have alerted Respondent, if it did not already know it, that Brudie was one of the employees who solicited the Union's assistance.²¹

Under *Wright Line*, *supra*, we turn next to whether Respondent has demonstrated that Brudie and Rakaska would have been terminated even in the absence of the Union's appearance. The records establish that in September 1979 Respondent's gross revenues ("adjusted" for the tariff and fuel surcharge increases) were about 10 percent lower than the figure for August 1979 or September 1978. However, Respondent's gross revenues for October 1979 were 20 percent higher than for September 1979 and 15 percent higher than for October 1978, and yet Brudie and Rakaska were not rehired. In fact, a review of Respondent's Exhibit 3 (as adjusted) shows previous declines in monthly revenues which were more drastic than the decline that occurred between August and September 1979. For example, revenues declined 20 percent between June and July 1978; more significantly, from March (the month Rakaska was hired by Respondent) to April 1979 revenues declined by almost 25 percent without anybody being laid off. Respondent might explain this by the fact that in May 1979 revenues almost reached its March 1979 level; however, this also occurred in October 1979 after the September 1979 decline. To summarize, the revenue listings establish that during 1978 and 1979 Respondent's monthly revenues increased and declined by as much as almost 40 percent always without the necessity of layoffs until 2 and 7 working days after the Union's request for recognition when layoffs were suddenly required.

The other summaries prepared and submitted by Respondent also establish that between August and September 1979 Respondent's "business" declined slightly. However, these summaries also establish that its business increased greatly in October 1979, and previously had declined to a greater degree than occurred between August and September 1979 without any layoffs being effectuated. I have not placed much reliance on the summary Respondent prepared regarding its business with

¹⁷ *N.L.R.B. v. Sutherland Lumber Co.*, 452 F.2d 67 (7th Cir. 1971), stated: "The abruptness of a discharge and its timing are persuasive evidence as to motivation."

¹⁸ Including the September 17 threat to Brudie, which materialized a week later, that if the Union came in he would be laid off because he was low in seniority.

¹⁹ See *N.L.R.B. v. Dan River Mills, Incorporated, Alabama Division*, 274 F.2d 381 (5th Cir. 1960), which stated: "[A]ntiunion bias and demonstrated unlawful hostility are proper and significant factors for Board evaluation in determining motive."

²⁰ *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959).

²¹ Even without a finding of knowledge by Respondent of the activities of Brudie and Rakaska on behalf of the Union, I would find that its layoffs of Brudie and Rakaska violated Sec. 8(a)(3) of the Act. The pretextual nature of the layoffs, the timing of the layoffs, and the numerous 8(a)(1) violations engaged in by Respondent establish that its purpose was to "shake the confidence of the employees in the Union as their bargaining agent." *Piezo Manufacturing Corp.*, 125 NLRB 686 (1959). See *Ellis and Watts Products, Inc.*, 130 NLRB 1216, 1220 (1961).

five specific companies and Modesti's general testimony regarding the customers Respondent lost during this period, since this information would be included in the other summaries referred to above; i.e., evidencing the "bottom line" amount of business with all its customers.

On the basis of the above evidence, and taking into consideration what I believe is the strongest evidence supporting Respondent's business defense, that it has been able to perform its operations with fewer drivers since the layoffs of Brudie and Rakaska, I would find that Respondent has not sustained its burden of establishing that Brudie and Rakaska would have been terminated even in the absence of their activities on behalf of the Union. I therefore conclude that Respondent terminated the employment of Brudie and Rakaska in violation of Section 8(a)(3) of the Act.

Based upon the foregoing findings of facts and the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Modesti Brothers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by Edward Modesti, Jr., violated Section 8(a)(1) of the Act by threatening its employees with closing its business and demanding increased productivity from its employees if the Union became the collective-bargaining representative of its employees.
4. Respondent, by Edward Modesti, Jr., violated Section 8(a)(1) of the Act by soliciting grievances and demands from its employees in order to induce them to refrain from giving their support to the Union.
5. Respondent, by Edward Modesti, Jr., violated Section 8(a)(1) of the Act by interrogating its employees regarding the identity of the employees who solicited the support of the Union, who was present at a meeting between the employees and the Union, and whether they had signed authorization cards for the Union.
6. Respondent, by Edward Modesti, Jr., violated Section 8(a)(1) of the Act by informing Kevin Brudie that he would be laid off if the Union became the collective-bargaining representative of Respondent's employees.
7. Respondent, by Edward Modesti, Jr., violated Section 8(a)(1) of the Act by threatening to discontinue its policy of lending money to employees if the Union became the collective-bargaining representative of its employees.
8. Respondent violated Section 8(a)(3) of the Act by terminating its employees Kevin Brudie and Roy Rakaska.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

To redress the unlawful terminations of Kevin Brudie and Roy Rakaska, it shall be recommended that Respondent offer them immediate and full reinstatement to

their former positions or, if those positions are not available, to substantially equivalent positions, without loss of seniority or other benefits, and make them whole for any loss of pay resulting from the discriminatory action against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their discharges to the date of a bona fide offer of reinstatement. Backpay shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include interest as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record in the proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²²

The Respondent, Modesti Brothers, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discontinuing its business operations and demanding increased productivity from its employees should they be represented for purposes of collective-bargaining by a union.

(b) Soliciting grievances and demands from its employees in order to induce them to refrain from giving their support to a union.

(c) Interrogating its employees regarding the identity of the employees soliciting support for a union, interrogating employees as to the identity of employees present at meetings between its employees and a union, and interrogating its employees whether they had signed authorization cards for a union.

(d) Informing its employees that they would be laid off if a union became their collective-bargaining representative.

(e) Threatening to discontinue its policy of lending money to its employees if a union became their collective-bargaining representative.

(f) Terminating employees due to their activities on behalf of a union.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act:

(a) Offer Kevin Brudie and Roy Rakaska immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or any other rights and privileges, and make them whole for any loss of earnings sustained by reason of the discrimi-

²² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

nation against them in accordance with the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, all payroll and other records necessary to determine the amount of backpay due under the terms of this Order.

(c) Post at its place of business, in Long Island City, New York, copies of the attached notice marked "Appendix."²³ Copies of said notice, on forms provided by the Regional Director of Region 29, after being duly

²³ In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed as to any alleged violations of the Act not found herein.